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Northwestern Railway Situation

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THE NORTHWESTERN RAILWAY SITUATION

WHAT promises to be the most important corporate litigation that has or is likely to come before the Supreme Court for many years is involved in the various suits against the Northern Securities Company. To understand its full significance, it is desirable to recall something of the railroad history of the western states.

Before 1850, the United States had acquired its present territory between the Mississippi and the Pacific,—about 1,100 miles wide and 2,000 miles long, and twice the area of the states east of the Mississippi. In 1850 this western territory had less than 2,000,000 population; in 1860, 4,500,000; and now more than 20,000,000. In 1860, it had 2,175 miles of railroad; in 1870, 12,013; in 1880, 32,202; in 1890, 73,943; in 1900, 87,981.

In 1853, Congress authorized surveys to ascertain the most practicable route for a railroad from the Mississippi to the Pacific. Lines were surveyed near the 47th, the 42nd, the 39th, the 35th, and the 32nd parallels. The route along the 35th parallel was considered impracticable. The other four lines of 8,400 miles were estimated to cost, with iron at $75.00 per ton, about $542,000,000, or $65,000 per mile. Since then, roads have been built substantially along all these routes.

Prior to 1849, communication with the coast had been either overland or around Cape Horn. In 1849 a steamship route from New York to Aspinwall and from Panama to San Francisco was established. The parts of this route were connected by railroad across the Isthmus in 1855. It then cost the government $263 per ton to send freight from New York to San Francisco.

AUTHORITIES: Commercial and Financial Chronicle; Interstate Commerce Commission Reports; Poor's Manual; VanOss, American Railroads as Investments; Petitions and briefs in suits, etc.

In 1850, the government entered upon the policy of granting land in aid of railroad construction, and between 1860 and 1871, gave more than 200,000,000 acres, more than the five states (Ohio, Indiana, Illinois, Michigan and Wisconsin) carved out of the Northwest territory—and advanced nearly $65,000,000 to railroads, west of the Mississippi. Notwithstanding these great gifts, those who originally undertook the construction of the Union and Central Pacific roads, were looked upon as subjects of delusion, and objects of pity rather than of envy.

Partly as a war measure, the government in 1862, authorized the construction of a railroad from Omaha to Sacramento, by chartering the Union Pacific Company to build westward to Ogden, Utah, and conferring upon the Central Pacific Company of California, organized in 1861, authority to build eastward to connect at Ogden with the Union Pacific. The Central Pacific was commenced first, by Crocker, Stanford, and Huntington, with a capital among them of less than $200,000. The government made a land grant to these two companies of over 23,000,000 acres, and a loan of from $16,000 to $48,000 per mile, or in all, $54,000,000, which was to be secured by a first mortgage, and paid by transporting the government freight until, at the regular rates, the earnings therefrom would discharge the loan and accumulated interest. Huntington and his associates obtained more than $550,000 along the line in California, and a land grant from the state of 10,000,000 acres, and constructed enough road to obtain $848,000 from the government; with this, they constructed another section of road and drew more money, and so on, until the road was finished. In 1864, the government was induced to waive its first lien, and allow both the Union and Central companies to borrow from private persons and secure by a first mortgage, an amount equal to the government loan. In this way they finished the line of about 700 miles to Ogden at an actual cost of $58,000,000, and had saddled it with stock and debt to the amount of $139,000,000, over $27,000,000 being the government debt. Progress on the Union Pacific had been slow until 1866, when the energy and methods of Oakes Ames and his *Credit Mobilier*, pushed forward the work to completion,—1,040 miles, at a cost of $51,000,000,—with a stock and debt of over $125,000,000; connection with the Central Pacific was made May 10th, 1869, and the first through line from Omaha to Sacramento 1,709 miles had been constructed in 1,500 working days. This was about the time that Bessemer steel rails began to be made in this country, that the sleep-

ing car was invented, and the first trunk line formed,—the New York Central. In 1874, the government is said to have saved over $9,000,000 in that year in cost of transporting mails and army supplies to the coast, as compared with the cost before this road was completed. Subsequently the line was completed to San Francisco by the Central Pacific, and the Union Pacific was consolidated with the Kansas Pacific, giving it a parallel line from Kansas City to Denver of 640 miles. These two lines formed the only transcontinental line until 1881; both had paid almost from the beginning, and had been closely allied; but in the meantime, Huntington had organized and begun to build the Southern Pacific, and, with the aid of a 14,000,000 acre land grant, in 1881 made connection at El Paso, Texas, with the Atchison road to the Missouri river; the next year connection was made with the Texas Pacific and over the New Orleans and Pacific, to New Orleans; and in 1883, the Southern Pacific acquired *control* of the Galveston, Harrisburg, and San Antonio, bringing it to New Orleans, and connecting with a line of steamers to New York. In 1883 the Denver and Rio Grande reached Ogden from Denver, where it connected with the Burlington and the Atchison to Chicago, and this gave the Central Pacific, an eastern connection other than over the Union Pacific. Huntington undoubtedly began to favor these other connections rather than the Union Pacific over the Central Pacific; to offset this to some extent, the Union Pacific began to build a road northwest from Ogden, which reached the Northern Pacific in 1882, at Garrison, Montana, by a narrow gauge line; and in 1884, the Oregon Short Line branch of the Union Pacific was completed to Huntington in Oregon and made connection over the Oregon Railway and Navigation Company to the Pacific; and with their steamship line to San Francisco.

When the Southern Pacific secured the control of the Galveston road in February, 1883, a pool was entered into between the various roads then competing for the Coast traffic.

On August 22, 1883, the east and west divisions of the Northern Pacific were connected, and there came into the field a new competitor,—a transcontinental line managed by a single company, connecting at Wallula with the Oregon Railway and Navigation line. This, as well as the Denver and Rio Grande, had to be reckoned with. So, in September, 1883, a convention was held, resulting in the Transcontinental Railroad Association pool, whereby the Northern Pacific and Oregon Railway and Navigation Company withdrew from any California business, and the Southern and Central lines made

the Portland rates the same as to San Francisco, plus the ocean rate between the cities; the southern traffic was to be divided in proportions agreed upon. In 1887, the Interstate Commerce Act went into effect, forbidding pools, so this one was superseded in 1889, by the Trans-Missouri Freight Association, whereby some fifteen of the roads then operating in the western states, entered into an agreement to fix and maintain rates on all competitive traffic between any two lines, within the territory west of the Missouri river and the 95th meridian, and upon all traffic within that territory to go eastward; monthly meetings were to be held, and rates agreed upon. Each road was to appoint some one who should be responsible for rates upon that road, and the agreement was to be enforced by penalties, etc. This and the similar Joint Traffic Association of the Eastern Lines, were held by the supreme court to violate the anti-trust act, and were dissolved in 1897 and 1898.[1]

Mr. Huntington, however, had desired a closer alliance between the roads he was interested in, and to bring them all under one management, not subject to hostile legislation by California, and perhaps to avoid taxes to some extent, in 1884 had organized the Southern Pacific Co. in Kentucky, and under one "Omnibus lease" took over all the Southern Pacific Railroad lines, and the Central Pacific and its lines. Additions and extensions were made by building, leasing, or purchasing the stock of various other lines; though money was made, the government debt was not paid, and, until 1878, very little provision made therefor. The government then required both the Union and Central to provide a sinking fund equal to 25 per cent of the net earnings annually. This, however, was not as much as the interest, and the debt continued to accumulate. It would fall due on both lines between 1895-99. When this time arrived, the companies had to be reorganized. Messrs. Kuhn, Loeb & Co., with a syndicate formed by E. H. Harriman, of the Illinois Central, and backed by the Goulds, undertook the reorganization of the Union Pacific; great effort was made to get the government to pass a refunding bill, but this was unsuccessful; the bonds amounted to $87,000,000, the government debt $53,000,000; and the stock was $61,000,000; a scheme was devised to issue $51,000,000 new 4 per cent gold bonds, and $41,000,000 4 per cent preferred stock, for the $87,000,000 bonds; $61,000,000 new common stock and $6,000,000 preferred stock for the $61,000,000 old common and $6,000,000 cash; and there were reserved $36,000,000, 4 per cent

[1] U. S. *v.* Trans-Mo. Frt. Assn., 166 U. S. 290; U. S. *v.* Joint Traffic Assn., 171 U. S. 505.

bonds and $21,000,000 preferred stock, to take up the government debt, and $13,000,000, bonds, and $7,000,000 preferred stock for reorganization purposes,—making in all $236,000,000 stock and bonds instead of $201,000,000 before reorganization. Substantially this plan was carried out, but by the government insisting on payment in cash of the $58,000,000 due when paid, it had to be modified somewhat; the line was sold at foreclosure and purchased by a new company organized in 1897 upon this basis. A somewhat different plan was applied in the case of the Central Pacific,—for the government, in 1899, through a committee appointed by congress accepted 20 promissory notes of $2,940,635 each, one payable every six months, with 3 per cent interest, amounting to $58,812,715. The company was then reorganized under a new charter from Utah; the old bonds were taken up by the issue of $116,000,000 new ones, guaranteed by the Southern Pacific Company, which also acquired all its new capital stock, $67,000,000 common, and $12,000,000 preferred, for $67,000,000 Southern Pacific stock and $28,000,000 of its 4 per cent 50-year bonds.

The original Northern Pacific was chartered in 1864, by Congress, and received a land grant of 47,000,000 acres,—twice the size of Indiana. It was organized in 1869, with $100,000,000 capital stock; by 1873, 450 miles from Duluth westward and 105 miles, from Tacoma eastward, were completed at a cost of $21,000,000, and upon which $30,000,000 bonds had been issued. Jay Cooke, its financial agent failed in that year, and in 1874, it went into the hands of a receiver It was reorganized in 1875, and its capital stock left at $100,000,000, but $51,000,000 was made preferred, to be exchanged for same amount of bonds; construction was vigorously pushed forward, but bonds had been issued lavishly so that when the road was completed in 1883, the stock and bonds amounted to over $130,000,000, and over $11,000,000 from land sales had been used also. The company continued to build branches and acquire other lines by issuing its bonds and guaranteeing others, and also leased the Wisconsin Central at over $2,000,000 rental, so that by 1893, its fixed charges were more than its net income. The Great Northern competition had by this time also become severe. It went into the hands of a receiver that year, and was reorganized in 1896, when its 54 different companies with 4,706 miles, and $380,000,000 stock and bonds, were brought under the control of one company organized in the interests of the bondholders. To reorganize to suit these, an old special charter, granted by Wiscon-

sin, with broad powers, but under which nothing had been done, was resurrected; a collusive suit of *quo warranto*, was brought against it for *non user*, in order to get a judgment affirming its validity; and after such judgment was obtained it was proposed to issue half of the stock of the new company to the Great Northern Co.,—which in turn should guarantee the bonds of the new company. A shareholder objected that this was illegal as being a virtual consolidation of parallel and competing lines contrary to the Minnesota law, brought suit to enjoin, and obtained judgment to that effect in the Supreme Court of the United States.[1] The reorganization scheme conducted by J. P. Morgan & Co. was a marvel of ingenuity, whereby $6,700,000 cash, $105,000,000, 4 per cent gold 100-year bonds, $56,000,000, 3 per cent gold 150-year bonds, and $55,000,000 4 per cent non-cumulative stock,—or $222,700,000 securities were issued to take up $147,000,000 old securities, and $17,500,000 new preferred shares, and $66,500,000 common shares, were issued for $35,000,000 old preferred stock and $49,000,000, old common, and $10,800,000 cash,—or for $83,000,000 new securities there were exchanged $84,000,000, old, with a payment of $10,800,000 cash, which seems to be with the possible payment of $51,000,000 of the original bonds, represented by the old preferred, about all the cash, (except from earnings), ever put in the road by its owners. The rest of the $80,000,000 common, and $75,000,000 preferred stock, went to the reorganizing syndicate. And notwithstanding the decision as to the invalidity of the proposed control by the Great Northern, something like $26,000,000 of the $155,000,000 stock was taken by Jas. J. Hill and his friends. The Wisconsin Central lease was canceled, and the fixed charges were reduced some $4,000,000 by the reorganization. The line, July 1, 1901, consisted of 2,947 miles main line, and 2,042 of branches,—or 4,989 operated directly. It owned 406 more (leased to others) and controlled 430 more making 5,825 traversing the great wheat belt of Minnesota and North Dakota, the mining and grazing districts of Montana, and the lumber and farming country of Washington, extending from Duluth through Fargo, Bismarck, Billings, Helena, Spokane, to Seattle, Tacoma, Olympia and Portland, with branches to St. Paul, Ashland, three or four up the Red River Valley, and to Butte, Walla Walla, etc.

In 1857 Minnesota incorporated, and made a land grant to the Minnesota and Pacific to build a road toward the Pacific; 63 miles

[1] Pearsall *v.* Great N. Ry. Co., 161 U. S. 646.

were constructed when it went into the hands of a receiver in 1860; in 1862 it was sold to the St. Paul and Pacific, incorporated in Minnesota in 1864; this company pushed construction, but the crisis of 1873 put it into the hands of a receiver; it was about to be reorganized in 1879 by its Dutch bondholders in Amsterdam; at this point Mr. James J. Hill appeared and organized a syndicate of Canadian capitalists to purchase the road. A representative was sent over to Amsterdam where he succeeded in inducing the Dutch bondholders to part with their interests in the 560 miles of road which had been constructed up to that time for a sum thought to be vastly less than the road was then really worth.

By this purchase Mr. Hill and his associates were made rich and he himself entered upon the career which has made him the greatest railroad operator in the Northwest. He and his syndicate organized the St. Paul, Minneapolis, and Manitoba Co., in Minnesota, which, with skillful management, prospered; it built many extensions, and acquired many branches, which, by 1889, made a total of 3,300 miles. Mr. Hill then concluded that it was desirable to bring these all under the control of one organization. He looked about for a suitable charter, found one with ample powers, granted in 1856 by the Territory of Minnesota to the Minneapolis and St. Cloud Railroad Co.,—but under which there had been built only 85 miles up to this time; these and the charter were acquired by Mr. Hill; the 85 miles were leased to the St. Paul, Minneapolis, and Manitoba, and the name of the St. Cloud Co. changed to the Great Northern Railway Co.,—which in 1890, leased all the lines owned or controlled by the St. Paul Co., for 999 years, guaranteeing 6 per cent dividend on its $20,000,000 stock, and the payment of the interest on over $80,000,000 bonds; the stock has since been purchased by the Great Northern Company issuing $25,000,000 of its own stock therefor. It extends from Duluth to Everett, on Puget Sound, with branches from Duluth to St. Paul, and to Yankton: also from St. Paul to Fargo, and from there, three or four nearly parallel lines 25 or 30 miles apart up the Red River valley; also to Helena, to Nelson, and Westminster, B. C., and to Seattle. It is about 100 miles north of the Northern Pacific, passing through the wheat belt of the Red River, tapping the silver, copper and other mining interests of Montana, Idaho, and Washington. It also runs a steamship line from Duluth to Buffalo, and has under construction some of the largest steamers in the world, to be engaged in the Oriental trade.

In nearly all of the above reorganization schemes fixed charges

have been greatly reduced by issuing new bonds at lower rates, and preferred stock, in the place of former bonds. If, however, the preferred stock receives the proposed preference dividend, in most cases the total amounts to be provided for are greater than before; and this, too, without meeting the clamor of the common shares for dividends.

The Chicago, Burlington and Quincy, with a center at Chicago has a line by way of Galena to St. Paul; another by way of Burlington through Omaha and Lincoln, to Billings, Montana, on the Northern Pacific; from Burlington a branch 25 or 30 miles further south extends through Lincoln to Cheyenne; another from Chicago, via Quincy and St. Joseph to Denver; and lines extend from Quincy to St. Louis, and St. Joseph to Kansas City. Originally chartered in 1851, consolidated with the Burlington and Missouri River in Iowa in 1873, and in 1880, in Nebraska and Kansas, it now consisis of 8,171 miles, with $111,000,000 stock, and $149,000,000 debt, earning $16,000,000 net, per year.

The decisions in the traffic association cases seemed to alarm the railroads and they rushed under cover of closer alliances, based upon property rights of some kind. Within two years after the last decision, more than 25,000 miles of existing lines were absorbed by former systems. The forms adopted were various, and have included: (1) Leases, purchase of stock control, complete consolidation, or combination of these, the most usual being the acquisition of shares, and pledging these to secure loans by which they were purchased. This is in no sense a real purchase: A. company agrees to issue its bonds; and B. company agrees to transfer its shares to A. company in exchange for the bonds; the bonds provide that the shares shall be deposited in trust to secure the bonds,—but till default is made on the bonds, the right to vote the shares is in A. company. The former shareholders in B. Company then own bonds of A. company, and A. company owns and votes the shares of B company. (2) "Community of interest," in which A. company acquires a substantial, though not a controlling interest, in B. company; and B. company acquires a like interest in A. company,—the idea being that two tenants in common of two competing properties are not likely to carry competition to the point of hurting either property seriously. This is certainly an inconvenient and inefficient method if *control* is desired,—the *personal* equation being too great. So there has been invented the (3) method "of blending the interests of different railroad properties through the medium of a *proprietary*

company," which may be looked upon "as the community of interest idea carried to its most perfect form where a permanent relation is desired, and consolidation is not expedient." Before the Northern Securities Co. was organized, the Southern Pacific Co., organized by Mr. Huntington in 1884 in Kentucky seems to have been the most conspicuous and successful, and so far has not been legally assailed.

In some of these various ways, between 1897 and 1901, the Vanderbilt lines increased from 16,909 to 19,378 miles; the Pennsylvania from 8,977 to 17,697; the Morgan-Hill interests from 17,328 to 38,043; the Gould-Rockefeller group from 10,858 to 16,935; the Harriman-Kuhn-Loeb syndicate, from 10,149 to 22,347; or the five systems from 64,221 to 144,400 miles, and of these the Vanderbilt, Pennsylvania, and Hill-Morgan, interests are closely allied, and the Gould-Rockefeller and Harriman-Kuhn-Loeb people likewise. In the carrying out of this process, the Harriman-Kuhn-Loeb syndicate, as a part of the reorganizing scheme of the Union Pacific, in 1899 increased that company's common stock from $61,000,000 to $96,000,000, and preferred, from $75,000,000 to $100,000,000, in order to acquire $19,000,000 ($8,460,000 having been acquired in 1898) of the capital stock of the Oregon Railroad and Navigation Co., and the Oregon Short Line Co.; in 1900 the Chicago and Alton was reorganized by the same people, and the old *railroad* company (organized in Illinois) was leased for 99 years to the *railway* company (organized in Iowa), and the latter issued $40,000,000 of its stock in exchange for the $21,000,000 stock of the old company; early in 1901, the Union Pacific people acquired the Huntington, Stanford and Crocker interests in the Southern Pacific, and a little later issued $93,957,000 of 4 per cent bonds, whereby it acquired $90,000,000 of the $197,000,000 stock of that great system, which controls over 9400 miles of railroad and over 16,000 miles of steamship lines.

The decisions of the Supreme Court do not seem to have accomplished the purpose sought; the traffic associations, however, were formally dissolved. Three different systems of classifying freight for rate purposes exist,—the *official*, obtaining east of Chicago and St. Louis, north of the Ohio river; the *southern*, east of the Mississippi and south of the Ohio; and the *western*, west of these. The lines in these various territories, January 1, 1900, changed the ratings by advancing lower class articles to higher class rates; in the *official* territory, 818 articles were advanced 21 per cent; in the

southern, 531 were advanced 30 per cent, and 105 reduced 26 per cent; and in the *western*, 240 were advanced 47 per cent, and 17 reduced 32 per cent.

The amalgamating process still continued. Early in 1900 it had been rumored that the Burlington company would build or connect with a new line to the Pacific coast. This would seriously affect the eastern connections of the Union Pacific, so they sought to buy such an interest in that company as would prevent it. If control of the Burlington was obtained by the Union Pacific, it would be a strong competitor with the Northern Pacific, from Billings eastward, as well as shut that company out of much of the traffic between the Northwest and the territory served by the Burlington. The Northern Pacific needed a Chicago connection; the Burlington was most desirable, so the Northern Pacific and Great Northern, offered to buy all the stock of the Burlington at $200 for each $100 share,—which had ranged the year before between 119½ and 144. This was accepted. To provide for payment, the two companies issued $215,000,000 4 per cent 20-year bonds, as a joint obligation, for $107,500,000 of the capital stock of the Burlington. The object was, as President Mellen of the Northern Pacific says, "that the company's relation with the eastern connections should be put on a more permanent basis;" and President Hill of the Great Northern pointed out that the Burlington is favorably located with ample terminals in the great traffic centers of Chicago, St. Louis, Kansas City, Omaha, Denver, St. Paul, Burlington and Des Moines, and at St. Louis connects with the chief cotton carrying lines of the south; the territory served is rich in all resources except timber, produces most of the machinery and implements used on farms, in forests, mines, and mills of the northwest, much of the iron and steel products exported to Asia; and the Burlington territory takes in return the live stock and timber of the northwest,—and it must continue to look more and more to the forests of Washington for its lumber.

In April, 1901, when it became known that the Burlington had accepted the offer of the two Northern companies, the Union Pacific demanded that they be allowed to share in that purchase, and be granted as favorable traffic relations over that line as the purchasing companies. This was refused, as President Hill states "because it would defeat our object, and be against the law of several states in which the longest mileage of the Burlington was situated." At this time the Northern Pacific common stock was $80,000,000, and preferred, $75,000,000, of which the Morgan-Hill people owned $26,-

000,000; in September before, the Northern Pacific common sold for 45¾. When refused, the Union Pacific retaliated by quietly buying Northern Pacific, and obtained over $60,000,000 in Europe, so that by the first week in May, 1901, they had become the owners of 43 per cent of the Northern Pacific stock. They then renewed their demand, and were refused. They immediately renewed their buying. Mr. Hill explained to his friends "that with the control of the Northern Pacific, the Union Pacific would control the entire Northwest and West, from Mexico to Canada, except the Great Northern;" so he and Mr. Morgan placed large orders for Northern Pacific common; the price in four days went from $133 to $1000 on May 9, and all sorts of gilt edged securities were sacrificed by the "shorts" to get out of "the largest stock corner ever known." Money went up to 60 per cent, and a panic was imminent, averted only by a syndicate providing $20,000,000 cash at market rates, and Mr. Morgan's firm offering $6,000,000 at 6 per cent, and by arranging a meeting of the contestants. At this "show of hands," it appeared the Morgan-Hill interests had purchased $16,000,000 common, giving them $42,000,000 altogether, or the majority of the common stock. The Union Pacific had $41,000,000 preferred, and $37,000,000 common, a clear majority of both; in ordinary corporate meeting, therefore, the Union Pacific would control the Northern Pacific, and half the Burlington. A truce was entered into whereby the naming of the Northern Pacific board was left to Mr. Morgan,—he holding the leading hand, by virtue of a peculiar provision permitting the common stock to pay off the preferred and retire it on the first of any January. Accordingly, Mr. Morgan in July nominated the following Northern Pacific directors: James J. Hill, President of the Great Northern Railway Company; E. H. Harriman, Chairman of the Executive Committee of the Union Pacific Railway Company; William Rockefeller, Director of the Chicago, Milwaukee and St. Paul Railway Company; H. McK. Twombly, Director of the Chicago and Northwestern Railway Company; Samuel Rea, Vice President of the Pennsylvania Railroad Company. He advised that they take hold of matters as soon as possible, and not wait for the annual election, saying:

"It is my opinion that a board thus constituted will contain within itself the elements best adapted for the formulation of the plan referred to in said memorandum in connection with Mr. William K. Vanderbilt, named therein as referee.

"Every important interest will have its representative who will be brought into close touch with the situation as a whole, and there should be no difficulty

in reaching a conclusion that will be fair and just to all concerned, and tend to the establishment of permanent harmony among the different lines. To this end I shall be glad to co-operate in such manner as will seem desirable."

A week or so later a meeting was held, and enough directors resigned to make places for the new men, who were duly elected,—the members of the old board continuing, being Robert Bacon, Charles Steele, Brayton Ives, D. W. James, J. S. Kennedy, D. S. Lamont, Chas. S. Mellen, James Stillman and E. B. Thomas. On October 1, this board was re-elected by the stockholders, Robert Bacon of the Morgan firm voting about $140,000,000 of the $155,000,000 stock, his proxies including both the Morgan-Hill and Union Pacific interests.

Early in October it became apparent that the Northern Pacific would retire its preferred stock. This was opposed by the Union Pacific, but they could not prevent it. Yet it was not an easy matter, as President Hill states: "The enormous amount of cash required for this purpose from a comparatively small number of men made it necessary for them to act together in a large and permanent manner through the medium of a corporation." Mr. Harriman offered to sell out the Union Pacific holdings of Northern Pacific to Mr. Morgan, and after some negotiating an understanding was reached whereby two proprietary companies were to be formed,—one to hold the Northern Pacific and Great Northern stock, buy the Union Pacific holdings of Northern Pacific, and pay therefor partly in cash and partly by issue of its own shares,—and the other proprietary company to lease the Burlington road, and the Union Pacific to have a half representation on its board. October 16, the C. B. & Q. *Railway* Co. was incorporated in Iowa with $100,000,000, stock to lease and operate the lines of the C. B. & Q. *Railroad* Co. (chartered in Illinois), for 999 years, guaranteeing 7 per cent on *its* stock,—apparently the only necessity for this, being "for legal reasons" and to get out some more stock for voting purposes to shift the control if necessary, since the *railroad* shares were pledged as security for the bonds issued for their purchase by the two Northern companies. The new company's stock was all placed in the treasury of the Northern Pacific and Great Northern,—half to each. All opposition to retiring the Northern Pacific preferred was withdrawn, and on November 13, the directors voted unanimously to call and retire all, at par, January 1, 1902, after paying an extra 1 per cent dividend upon it in the meantime. To raise the necessary money it was determined to issue at not less than par

$75,000,000 4 per cent bonds convertible at the company's option into common stock at par, each of the common (*but none of the preferred*) shareholders to be permitted to subscribe at par for 75-80ths of his present holdings; a syndicate was organized, and agreed to take all these bonds at par, if the common shareholders did not. Suit was immediately brought by a preferred shareholder in the New York courts, claiming the right to subscribe for the bonds equally with the common shareholders, and asking an injunction till that was allowed. The injunction was denied, on the ground that the legal remedy by action for damages was adequate.

The same day, November 13, 1901, that the Northern Pacific unanimously voted to retire the preferred shares, the *Northern Securities Co.* was incorporated in New Jersey with $400,000,000 capital authorized, to take over the control of the Great Northern and Northern Pacific. The Union Pacific was to have a substantial representation in its board, and own about 23 per cent of its stock, in exchange for its holdings of Northern Pacific. It was given out that for each $100 Northern Pacific, $115 Northern Securities Co. stock could be had,—though the year previous the prices of Northern Pacific had ranged from 45¾ to 86½; likewise for each $100 Great Northern stock, $180 in shares of Northern Securities could be had,—the range of this stock the year before being 144¾–191; to acquire the whole stock of both companies at the same rates, would require $403,250,000. Almost immediately the holders of $90,000,000 of the $125,000,000 Great Northern stock assented to the terms of the exchange; and by January, 1902, substantially all of the Northern Pacific stockholders had done so. And "the settlement ends the controversy over the Burlington, provides for single ownership of the Northern Pacific and Great Northern, and assures protection to the Union Pacific interests in the Northwest. The company was authorized to begin business with the $30,000 subscribed at the time of incorporation, by three persons having no special interest in it. It immediately elected for directors Jas. J. Hill, J. S. Kennedy, W. P. Clough, E. T. Nichols, and N. Terhune, (officers or directors of the Great Northern); D. W. James and D. S. Lamont (friends of Mr. Hill); E. H. Harriman, J. H. Schiff and J. H. Stillman (of the Union Pacific); and G. F. Baker, Robert Bacon, and Geo. W. Perkins, (representing J. P. Morgan & Co.); and Samuel Thorne, George C. Clark, and John S. Kennedy. Hill was made president, and Kennedy, Baker, James, and Clough, vice presidents. It was stated that there was no intention to allot the directors in any proportionate way "but rather to form the strongest

and most harmonious combination possible representing the joint interests involved." It began paying one per cent quarterly dividends February 1, 1902, and has continued to do so ever since, and Mr. Hill estimates its gross earnings will be $150,000,000 this year. Its shares are quoted at 110.

The only remaining line reaching the Pacific coast is the Atchison with 7,860 miles, from Chicago to Kansas City, Galveston, Pecos, Denver, El Paso, Albuquerque, San Diego, Los Angeles, and San Francisco; J. P. Morgan & Co. have representation on its board and executive committee. The principal other systems in the western territory are the Chicago and Northwestern, 7,000 miles, controlled by the Vanderbilts, and friendly to the Morgan-Hill people; the Chicago, Milwaukee and St. Paul, 6,597 miles, between which and the C. & N. W. there is such a community of interest that competition is very little; the Missouri-Pacific system, 1,773 miles, controlled by the Goulds and friendly to the Union Pacific; the Rock Island system, now of 6,500 miles, from Chicago to Watertown, South Dakota, Omaha, Kansas City, Fort Worth, El Paso and Denver, seems to be almost an independent line. Of course, to some extent, the Canadian Pacific is a competitor for the coast traffic.

Under a competitive regime, average freight rates in cents per ton per mile have declined as follows:

	All roads	Union Pacific	C., R. I. & Pac.	C., Mil. & St. P.
1875 —	1.421	2.164	1.688	1.833
1885 —	1.011	1.420	1.043	1.278
1890 —	.941	1.138	.995	.995
1895 —	.839	.971	1.084	1.075
1899 —	.724	.992	.930	.937

A summary of the Union Pacific and Northern Securities systems shows:

	Miles	Stocks and bonds outstanding	In hands of public
Union Pacific (1901), Controls	5,543	$988,000,000	$655,000,000
{ Southern and Central Pacific }	9,441	901,000,000	568,000,000
Owns large interest in Northern Securities		400,000,000	*400,000,000
Controls			
{ Great Northern	5,249	469,000,000	330,000,000
{ Northern Pacific	5,019	495,000,000	426,000,000
Control			
C. B. & Q. Ry. Co.		100,000,000	
Which leases			
C. B. & Q. R. R.	8,171	360,000,000	149,000,000
Total	33,423	$3,713,000,000	$2,528,000,000
Per mile		$111,000	$75,600

* This is on the Securities Co's theory that it is purely a *holding* company, and not a *controlling* company. Its shares are held mostly by former shareholders of Great Northern and

This makes a pretty good sized sum ($75,600 or $111,000 per mile of road) upon which it is expected the western people will pay interest and dividends for their transportation. This is three to five times as much as the most careful estimate of the cost per mile ($23,355) of reproducing the 7,082 miles in Michigan, in 1900, and five to seven times as much as a like careful estimate of the cost per mile ($15,731) of the 9,057 miles in Texas, made in 1896. In 1887, Richard Morgan, for the government estimated, after careful examination, the cost of reproducing the 2,774 miles of the Union Pacific and Central Pacific, including terminal facilities, at $37,280 per mile.

In this way Mr. Hill has saved the people of the Northwest from the dire calamity of violated laws and Union Pacific control,—with Mr. Hill outside; and yet the main reason for organizing the Northern Securities Co., was the terrible anxiety felt by these venerable financiers' approaching "where the wicked cease from troubling and the weary are at rest," lest the "farmers of the west" would have no one to look after them when these men and their methods were gone.

The validity of the merger was challenged immediately. November 20, Governor Van Sant of Minnesota called a meeting to be held in December, at Helena, "to join in an effort to fight the great railway trust." Each of the states from Wisconsin to the coast, except South Dakota, Idaho, and Oregon forbids the consolidation of competing lines, and all, except Idaho and Oregon, have anti-trust acts. December 31, the Attorney General of Minnesota determined to bring suit. The same day the Interstate Commerce Commission decided to investigate the matter. At the Helena meeting it was unanimously resolved by the attorneys general of the various states that "we hereby give our unqualified approval" to any proper proceeding to test the validity of the consolidation in any court of competent jurisdiction. Wall Street, (it was stated), felt no solicitude, for the formation of the company had been directed by the best legal talent in the East. Litigation began at once, four suits being filed.

1. *The Power suit* was brought December 30, 1901, to enjoin the retirement of the Northern Pacific preferred, January 1, 1902, in a Minnesota court, away from the general offices of the company, by Power, a clerk in a lawyer's office in New York, acting as a

Northern Pacific, and their shares are held by the Securities Co. which claims to be a member of the public and a mere holder like an Insurance Co. would be.

dummy for an apparent owner of 100 shares of Northern Pacific; the state court granted a temporary injunction; by exceedingly prompt action the company's attorneys secured its removal to the U. S. circuit court the same day; it was heard the next morning, the injunction dissolved, and bond for stay of proceedings pending an appeal, refused. The legal obstacle being overcome the retirement of the $75,000,000 preferred stock began January 1, 1902, and over $60,000,000 was retired that day. The same day the company concluded to call upon those who held the bonds issued in November for this purpose, to convert them into common stock, raising the total thereof to $155,000,000. In May, testimony in this suit began, and all the leading Securities Co. officials testified with remarkable frankness as to the formation of the company, but, although summoned, Mr. Power did not appear; his attorney, under threat of fine was ordered to produce him; this brought him from Montreal, where he had been sent and kept by one Weinfeld, who claimed to be the real owner of the stock upon which the right to sue was based; Power was sentenced to jail for 30 days, and his attorney ordered to explain,— which he did by saying his supposed clients had lately stated they were not such. The hearings were then adjourned *sine die;* a little later, Weinfeld asked to have the record show he owned the stock instead of Power; this was done, the court lectured Weinfeld, dismissed the case, and said there was no doubt about the validity of retiring the preferred Northern Pacific stock. It is difficult to understand this suit. On its face it has the appearance of a collusive suit to manufacture sentiment in favor of the Securities Co., have the legality of the stock transaction determined, and furnish an opportunity for the Securities Co. officials, to tell their story in their own way, without any very serious cross-examination.

2. *The Minnesota suit:* January 7, 1902, the state of Minnesota, applied to the Supreme Court of the United States for leave to file a bill against the Northern Securities Company to enjoin it from exercising control over the Great Northern and Northern Pacific railroads contrary to the laws of that state. It showed that the state owned more than 3,000,000 acres of public land yet unsold, the value of which largely depends upon free competition between these roads; that heretofore the rivalry between them had led them to build spur lines into new territory, and this will cease under the merger; that the state maintains various public institutions, for which it is necessary to ship large quantities of supplies over these roads; that the

state needs to raise $700,000 per year largely from taxes on land, the value of which depends much upon unrestricted competition between these roads; that it has granted over 10,500,000 acres of land mostly in aid of these railroads; great quantities of grain and merchandise are shipped between points over these lines, where cheap competition has secured lower rates than will be obtained if the merger is not enjoined.

The roads are then described, the directors named, and it is alleged that James J. Hill, President, Wm. P. Clough, Vice President, and E. T. Nichols, Secretary, are the executive committee of the Great Northern; that Mr. Hill controlled more than a majority of its capital stock, while J. P. Morgan controlled more than 85 per cent of the capital stock of the Northern Pacific; that the roads are parallel and competing between St. Paul and Duluth, St. Paul and Crookston, Duluth and Crookston, in the state, and through all the states from Lake Superior to Puget Sound.

Then the acquisition of the C. B. and Q. is detailed; then the facts relating to the organization of the Northern Securities Co., are set forth, with a copy of its charter showing its objects are: to acquire and hold as investment any securities or shares issued by any other corporation anywhere; to purchase, hold, or transfer any such securities or shares, and while owner, to exercise all the rights thereof, including the right to vote on the shares held; to aid in any manner any corporation of which any securities or stock are held, and to do any acts designed to protect or enhance the value of such; to acquire and hold the real and personal property necessary or convenient, and do any of these acts and things in any state or country; to have perpetual duration, $400,000,000 capital stock, and begin business with $30,000,

It is alleged that this company was incorporated at the instigation and request and under the direction of Hill and other stockholders of the Great Northern, who then controlled a large majority of its stock, and J. P. Morgan and other stockholders of the Northern Pacific, who likewise controlled a majority of that company's stock; that it was organized solely to effect a consolidation of the property, railway lines, corporate powers and franchises of such companies, by causing to be transferred to it substantially all of the stock of the two companies in exchange for the shares of the Securities Co.; that this was done with full knowledge of the facts and as a part of the scheme by all the parties to it; also as a part of the scheme and to defeat possible litigation, the Great Northern shares were not to

be transferred on its books, but were to be held temporarily by some unknown person for the benefit of the Securities Co., and voted in its interest at all meetings of the Great Northern; that the sole purpose, object and effect were to transfer and vest in the Securities Co. and its directors the complete control of these lines, with the power to dictate the policy, fix rates, in and out of the state, and create a monopoly in railway traffic therein, in restraint of trade and against public policy; that in December, 1901, the Securities Co. and its officers began doing these things; that the laws of Minnesota provide: no railroad corporation shall consolidate the stock, property or franchise of such corporation with, or in any way control any other railroad corporation owning or having under its control a parallel or competing line; nor in any way become the owner of, or control any such railroad corporation, or the stock, franchises, rights or property thereof. That the Securities Co. is a *railroad* corporation within these provisions, and the purpose of its organizers was and is to violate and evade them, and the acts done are violations and evasions thereof, and unless they are enjoined will cause irreparable injury to the state, there being no adequate remedy at law.

The prayer asks that the Securities Co. and all its shareholders and its or their agents be perpetually enjoined from voting the stock or attending the meetings of the two companies, or in any way taking part in the management of either, and from making any arrangements having the effect to establish a joint control over them or their property, and from controlling any of the stock of both companies at the same time for such purpose.

The brief of counsel,[1] in support of the application contended: (1) The constitution grants original jurisdiction to the Supreme Court in all controversies between a state and a citizen of another state.[2] (2) The right of a state to invoke the jurisdiction of this Court to protect its property and individual rights, in an action against citizens of sister states has long been recognized.[3] (3) The state has the same right, as *parens patriae*, or as trustee for all her citizens.[4] (4) When a quasi public corporation is doing or

[1] W. B. Douglas, Attorney General, M. D. Munn, and Geo. P. Wilson, of counsel, citing authorities in the notes, below:

[2] Sec. 2, Art III, Const.; § 687 R. S.

[3] Pennsylvania *v.* Wheeling Bridge, 13 How. 519.

[4] Pearsall *v* Great Northern, etc. 161 U. S. 646; L. & N. Railway Co. *v.* Kentucky, 161 U. S. 677; U. S. *v.* Missouri Frt. Assn. 166 U. S. 290; U. S. *v.* Joint Traffic Assn. 171 U. S. 505; Missouri *v.* Illinois, etc. 180 U. S. 208; Ohio Oil Co. *v.* Indiana, 177 U. S. 190, 150 Ind. 1.

about to do an *ultra vires* act damaging to the property interests of the state, or is injurious to the public or a large number of the citizens, the attorney general, on behalf of the government may maintain an action to enjoin the same.[1] (5) The Minnesota statutes, which are violated, are in no sense penal, but enable a stockholder, a person suffering special injury, or the state, as representative of all the people, to enjoin their violation.[2] (6) These statutes, relating to corporations as they do, became a part of the charter of those corporations permitted to do business in the state.[3] (7) These statutes are also in accord with the policy of the United States, and of New Jersey, relative to the consolidation or union of competing railroads.[4] (8) The duty to obey the laws of Minnesota is imposed on and *forever remains upon the stockholders* of the corporations created by the state, and cannot be escaped.[5] (9) The stock, therefore, of the two railroad companies, held by the Securities Co. must be deemed to be held by it as though located in and subject to all the laws of Minnesota, and every power sought to be exercised by it by virtue of such stockholding must be in harmony with and not in violation of such laws.[6] (10) The consolidation tends to create a monopoly in railway traffic, amounting to a common law nuisance, which the state may enjoin.[7] (11) The state also claims the right to avail itself of the provisions of the National anti-trust law.

The brief[8] for the defendant argued: The bill does not present a controversy of a *civil* nature between a state and a citizen of another state. It asks this court to restrain a citizen of New Jersey *from doing there* acts which are lawful there, simply because those acts violate or evade the penal laws of Minnesota; the grievance is

[1] Pomeroy's Eq. § 1093; Attorney Gen'l *v.* Railroad Cos. 35 Wis. 524; Stockton *v.* Central Ry. of New Jersey 50 N. J. Eq. 52, 24 Atl, 964; Trust Co. of Georgia *v.* Georgia, 109 Ga. 736, 48 L.R.A.520; G. C. & F.S.Ry. Co. *v.* State, 72 Tex. 404; Commw. *v.* Pittsburg etc., Ry. Co. 58 Pa. 45; Pennsylvania R. R. Co *v.* Commw. 7 Atl. 374.

[2] Pearsall *v.* Great Northern Ry. Co. 161 U. S. 646; Huntington *v.* Attrill 146 U. S. 657; Wisconsin *v.* Pelican Ins. Co. 127 U. S. 265, is distinguishable.

[3] Supreme Lodge K. of P. *v.* Weller, 93 Va. 605, 25 S. E. 891; People *v.* Chicago Gas Co. 130 Ill. 268, 22 N. E. 798.

[4] U. S. Anti-Trust Act of 1890; U. S. *v.* Mo. Traffic Assn. 166 U. S. 290; U. S. *v.* Joint Traffic Assn. 171 U. S. 505,

[5] Memphis & L. R. Co. *v.* Commrs. 112 U. S. 609; Thomas *v.* Ry. Co. 101 U. S. 71; New York and Md. Ry. Co. *v.* Winans 17 How. 30; Gibbs *v.* Balt. Gas Co. 130 U. S. 396.

[6] Bank of Augusta *v* Earle, 13 Pet. 519; Pinney *v.* Nelson. 183 U S. 144, 22 Sup. Ct. 52.

[7] Missouri *v.* Illinois, etc. 180 U. S. 208.

[8] Of J. G. Johnson, John W. Griggs, and W. D. Guthrie, citing authorities indicated.

that stock which is transferable personal property by the laws of Minnesota, formerly vested in several persons, has now been united in one holder. No law of Minnesota prohibits private corporations from holding stocks of parallel or competing lines; the threatened injury to the proprietary interests of the state is remotely fanciful, conjectural and contingent; the state has full power to prevent unreasonable charges; the allegation that the Securities Co. is a railroad corporation is forced and preposterous, and need no further notice. The original jurisdiction of this court extends only to civil controversies.[1] The statutes relied upon are essentially penal, the anti-trust act fixing a penalty. No one but the Attorney General of the United States can enjoin the violation of the Federal Act.[2] The laws of no state can directly affect or bind property out of its territory.[3] There is no analogy between this case and a nuisance threatening immediate, actual physical injury to property or health.[4] No state can punish one for a killing by shooting across its line from another state, until its court gets jurisdiction of the offender. The Securities Co. is a citizen of New Jersey, and can do there whatever her laws permit, and no federal court can interfere. The nature of the anti-consolidation laws, though no penalty is provided is the same as the anti-trust laws; they all are enforced by the state to prevent or redress public wrongs, and not violated private rights, and they have no extra-territorial effect.[5]

The court rendered its decision[6] February 24, to this effect: (1) It is not necessary to consider whether the controversy is of a civil nature or not. (2) The general rule of equity requires all persons materially interested to be made parties. (3) The court may *sua sponte* enforce this rule. (4) This court has not original jurisdiction in a suit by a state when a necessary defendant is a citizen of the same state. (5) The parties to be affected are the

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[1] Wisconsin *v.* Pelican Ins. Co. 127 U. S. 265, 297; Chisholm *v.* Georgia 2 Dall. 419, 431, 432; Cohens *v* Virginia, 6 Wheat. 264, 398, 399; State of R. I. *v.* Mass. 12 Pet. 657, 722; Hans. *v.* Louisiana, 134 U. S. 1, 12, 14; Capital Traction Co. *v.* Hof, 174 U. S. 1, 9.

[2] 26 Stat. 209, C. 647, §§ 4, 7.

[3] Story, Conflict of Laws §§ 7, 8, 20; Houston *v.* Moore, 5 Wheat 1. Dred Scott *v.* Sandford, 19 How. 393, 460.

[4] State *v.* Hall, 115 N. C. 811, 28 L. R. A. 289, 291.

[5] State *v.* C. B. & Q. R. Co. 37 Fed. 497; Dey *v.* C. M. & St. P. Ry Co. 45 Fed. 82; Moloncy *v.* Amer. Tobacco Co. 72 Fed. 801, 802; State *v.* Allegheny Oil Co. 85 Fed. 870; Arkansas *v.* Kans. & T. Coal Co. 183 U. S. 185; Huntington *v.* Attrill, [1893] A. C. 150; 146 U. S. 657; Dicey, Conflict of Laws pp. 220, 221.

[6] State of Minnesota *v.* Northern Securities Co., 184 U. S. 199.

State, the Securities Company and the two railway companies, and all are necessary parties. (6) But the railway companies being corporations of the state of Minnesota, making them parties, defeats the original jurisdiction of this court, and so an amendment can not be allowed, and the motion for leave to file the bill must be denied.

In April, the Attorney General began suit in the state court against the Northern Securities Co. making the railway companies and certain shareholders and officers defendants. In July, this suit was removed to the United States circuit court at St. Paul, and the defendants filed answers, September 1.

3. *The Government suit*: On February 19, Attorney General Knox stated, "Some time ago the President requested an opinion as to the legality of this merger and I have recently given him one to the effect that in my judgment it violates the provisions of the Sherman Act of 1890; whereupon he directed that suitable action should be taken to have the question judicially determined."

The two railroad companies, the Northern Securities Co., J. P. Morgan, and James J. Hill and their associates, stockholders in the two companies, were made defendants, and the suit filed in the United States circuit court for the District of Minnesota at St. Paul, on March 10, 1902. The general allegations are substantially as given above in the Minnesota suit; but the things are alleged to have been done by the defendants with the additional purpose of contriving and intending unlawfully to restrain the trade or commerce among the several states and between said states and foreign countries carried on by the two roads, and prevent competition among said railway systems in respect thereof, and for that purpose said defendants entered into an unlawful combination or conspiracy to effect a virtual consolidation of these railways and suppress the competition theretofore existing between them by means of a *holding corporation* (describing the Securities Co.), and alleging:

"In this manner, the individual stockholders of these two independent and competing railway companies were to be eliminated and a single common stockholder, the Northern Securities Co. was to be substituted; the interest of the individual stockholders in the property and franchises of the two railway companies was to terminate, being thus converted into an interest in the property and franchises of the Northern Securities Co. The individual stockholders of the Northern Pacific Railway Co. were no longer to hold an interest in the property or draw their dividends from the earnings of the Northern Pacific system" (and likewise with Great Northern), "but having ceased to be stockholders in the railway companies and having become stockholders in the holding corporation, both were to draw their dividends from the earnings of both systems, collected and distributed by the holding corporation. In this

manner, by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both systems for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in the holding corporation, with not only the power but the duty to pursue a policy which would promote the interests not of one system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established."

Then it is alleged that this scheme will be carried out and continued if not enjoined. The prayer asks that the Securities Co., and all connected with it, be perpetually enjoined from acquiring, voting or acting as owner of shares in either of these railway companies, and that a mandatory injunction issue to recall and cancel any of its shares issued in exchange for shares of the two companies; that these companies be enjoined from recognizing the Securities Co. as the owner of any of their shares, or permitting it to vote the same, or from paying any dividends to it or its assigns, and from recognizing any assignment of stock by it; that the individual defendants and all stockholders of the railway companies be enjoined from holding, voting, or acting as owner of any Securities stock received in exchange for stock of the railways, and a mandatory injunction issue to compel the surrender of such, and the return of the railway stock; that all the defendants, and all others, be now and forever enjoined from doing anything in furtherance of such combination, or intended or tending to place these railway companies or their interstate or foreign trade, under the control, legal or practical, of the Securities Co. or any one acting for, or in lieu of, it.

Wall Street was shocked and could "not understand how the president becomes so conspicuous in the movement," and "from what source the animus comes which has given inception to the action" which "is a severe blow to confidence, . . very unfortunate" and will not "add to the popularity of any one."

Editorially, the *Commercial and Financial Chronicle* argues "the Anti-trust law applies only to 'property' . . . 'in the course of transportation from one state to another,' in relation to which the contract, to be illegal, operates in restraint of trade;" . . . "the mere fact that one company owns a majority of the stock of two competitive roads whether the holder is a security company or a life insurance company cannot itself constitute restraint of interstate trade, or be so construed; the subject attacked will be certifi-

cates of stock and not 'property' . . 'in the course of transportation from one state to another.'" It adds:

"We are extremely sorry the government should put itself in this false position. It is prosecuting men whose acts and works have made them prominent the world over as having accomplished the most marvelous results for the commerce and industrial development of the United States at home and abroad."

The defendants' answers were filed May 5; hearings began September 16; the testimony of Hill, Clough, Schiff, Morgan and others taken, and exhibits made, in the Power suit, were accepted as evidence, subject to further examination. Testimony is being taken now [1] from time to time in these cases.

4. *The Washington suit:* After the adverse decision in the Minnesota case, the state of Washington brought suit, April 7,—neither company being a citizen of that state. Argument for leave to file was made April 14, and April 21, the Court granted the application, almost as a matter of course, and without expressing any opinion on any point involved. The bill is almost precisely the same (with necessary changes), as in the Minnesota case. The state constitution forbids consolidation of corporations owning competing lines; also forbids common carriers from making contracts by which "the earnings of the one doing the carrying are to be shared by the other not doing the carrying;" and also forbids the creation or existence of monopolies or trusts in the state. These are all counted on. The Securities Co., and both railway companies, (but no shareholders) are made defendants; the combination is, throughout, called an illegal conspiracy, and allegations like those in the government suit are added.

In New York, it was said, concerning the Court's action:—

"It is never good policy in this country to restrain materially any considerable body of our people in the use of full freedom for ventilating and litigating in whatever way it chooses a supposed grievance. . . . If the litigation is successful no such result as is anticipated by those who are active in the proceedings can be secured, because no courts, no litigation, and no legislation even, can take away the property concerned from those who have bought them and now hold them."

In August, 1902, Mr. Hill and Mr. Mellen, presidents of these two roads, in a meeting with the farmers of Eastern Washington, very astutely agreed to cut the rate on wheat shipments in both direc-

[1] Dec. 10, 1902.

[2] State of Washington *v.* Northern Securities Co., 185 U. S. 254.

tions, over their lines, ten per cent.—"a gift of about $1,000,000 to the farmers," as the financial papers say. About the same time the wages of the 7,000 C. B. & Q. conductors were materially increased.

Answers were filed November 11 and 12, 1902. These, in the various suits, *deny* in substance: that construction of branch roads will be lessened; that competition has been, or will be, diminished and rates advanced; that the railway lines are parallel or competing to the extent alleged; that the transfer of shares has in effect consolidated the two companies; that they are being or will be operated under a single management; that there has been any delay in transferring Great Northern shares to the Securities Co. for purpose of concealment or defeating possible litigation; that the Securities Co. has at any time dictated the policy, management, business or rates of the railway companies; that any monopoly has been attempted, designed, or created in any of the states or in interstate trade or commerce; that the Securities Co., is a railroad company, or is doing business in, or has any property in either Washington or Minnesota; or that it is in any way avoiding, evading or violating the laws of either state or of the United States; that the traffic of the two roads has been or is to be put under one management or control; that the Securities Co., has purchased, offered or sought to purchase any of the railway stocks in exchange for its own, but has done so for cash, as well as that of other roads; that Hill has ever had in his possession or subject to his control a majority of Great Northern stock; that the two lines ever competed for traffic in any way different or to any greater extent before the merger than since, and will continue to do in the future. Also it is alleged that those interested in the organization of the Securities Co., did not own within $26,000,000 of a majority of the Northern Pacific shares; that the Securities Co. now holds $150,000,000 of the stock of the Northern Pacific, and has acquired by transfer on the Great Northern books about 5-12ths of that company's stock, and has negotiated for about 4-12ths of the total of such stock, which has not yet been transferred, and as to which, it has, at present, no voting power. The company has paid for such shares more than $40,000,000 in cash. Many stockholders have not sold, and may not sell shares, and neither company, by any act or suggestion, has solicited shareholders to sell to the Securities Co.

The testimony so far as published, does not differ materially from the facts given herein, taken from reliable reports[1] as they occurred

[1] Commercial & Financial Chronicle.

from day to day. Mr. Morgan testified he did not recall the details of the reorganization transaction whereby some $26,000,000 of Northern Pacific stock was purchased for Mr. Hill and his associates at that time. As to the Burlington purchase, that the Northern Pacific needed a Chicago terminal, that he wanted the St. Paul, and Mr. Hill the Burlington, but the latter was selected, and he advised Mr. Hill to pay $200 per share for it. As to the Northern Pacific fight, his firm bought $15,000,000 stock to carry the control, because as its fiscal agents he felt a moral duty not to let it pass into Union Pacific hands; Union Pacific men were put on the Burlington board in carrying out a community of interest plan; the majority of the stock of the Northern Pacific was placed in the Securities Co., so as to insure a continuation of the policy of the road, and the "moral" control thereof. No other control was contemplated. Some two years ago Mr. Hill had approached him about forming a holding company, which would throw the Northern Pacific and Great Northern interests together; he replied they could work together, but any closer alliance was against the law; the Securities Co. was not thought of before May 9, 1901, but after that he thought it desirable, so the stockholders he represented would not suffer if he should die, or his firm be dissolved. He did not help organize the company, but approved the plan, and his firm holds between 120,000 and 130,000 shares; the retirement of the preferred stock of the Northern Pacific, was not a part of the plan to form the Securities Co. All parties had acted independently, and there was no understanding looking to control of rates, or design to obstruct commerce in any way.

Mr. Schiff testified the Union Pacific interests received over $80,000,000 in Northern Securities stock, and between $9,000,000 and $10,000,000 cash for their $78,000,000 Northern Pacific stock.

Mr. Harriman testified that till November 13, 1901, he had supposed they owned a controlling interest in Northern Pacific, but when it was determined to retire the preferred stock, negotiations were opened with Morgan & Co.; before these were closed, it was understood they would take shares in a holding company, to which the Northern Pacific shares were to be transferred at $115 per share, and $180 for Great Northern shares; he was not consulted about the formation of the company, and transferred their shares to avoid a legal contest.

Mr. Kennedy, a director of the Securities Co., testified that in June 1901, in conversation with Mr. Hill, he decided to turn all

his Great Northern shares to the holding company, and he and most of the other stockholders gave their proxies to Mr. Hill, and it was then understood that the holding company was to get enough stock of each railway company to make sure there would never be any combination against the Great Northern, enough to control the policies of both companies, and to elect the directors of both roads. Mr. James, another director testified to the same.

Recently, Poor's Railroad Manual (1871-1902), and the Commerce Commission Reports (1887-1901), were admitted as evidence (under objection) to show that it has always been customary for one company to acquire, hold, and vote part or all of the stock of other railroad companies; that this was known to Congress when the anti-trust act was passed, and since that does not expressly forbid this, it was not meant to declare it illegal.

It is not the purpose here to enter into any argument as to the legal character of these transactions. Judge Noyes, has very lately given some pertinent principles:[1] (1) "Prohibitions against the consolidation of competing railroads are declaratory of public policy. (2) Practical as well as technical consolidation contravenes such provisions. (3) Between the state and the corporation, acts of the stockholders may be regarded as acts of the corporation (4) Unity of ownership is distinguishable from community of interest. (5) Assuming that an individual stockholder has the right to sell his stock, it does not necessarily follow that a majority may combine to sell their stock."

These, and the further principle, that the right to issue, own, sell and vote shares of stock is a franchise granted subject to the laws of the creating state, the conditions of which inhere in the shares wherever they may be, or whoever may hold them, and form part of the contract between the state and the holder, enforceable, not as a penalty, but as a *civil* right as for a condition broken, if violated, — would seem to furnish a solution of the problems involved in the suits by the states. H. L. WILGUS

[1] Intercorporate Relations (1902), § 36.